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No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

-against-

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME
COURT OF THE STATE OF FLORIDA

James E. Daniels

Counsel of Record for
Petitioner Jeffery Joseph
Daugherty

Richard H. Sayler
Allan R. Freedman
30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Of Counsel:
Robert Garcia
James L. Stengel
Daniel J. Thomasch

DONOVAN LEISURE NEWTON & IRVINE

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Eighth and Fourteenth Amendments to the United States Constitution tolerate the imposition of a death sentence where, despite Petitioner's request and contrary to the requirements of state law, the state reviewing court did not have before it, and therefore failed to review, substantial portions of the sentencing record and failed to evaluate and reweigh properly that portion of the record that it had?

2. Can the penalty of death be constitutionally imposed where prior convictions which were expressly relied on as a partial predicate for the death sentence had been reversed as unconstitutional?

3. Whether an unbridled evidentiary examination into the circumstances and details of prior crimes, and the consequent elimination of the focused and objective weighing of aggravating and mitigating circumstances demanded by the Eighth and Fourteenth Amendments, can be justified under a state statute which identifies prior convictions but not prior crimes as an aggravating circumstance?

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PETITION FOR A WRIT OF
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COURT OF THE STATE OF FLORIDA

Petitioner Jeffery Joseph Daugherty, an indigent, respectfully prays that this Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of Florida affirming the sentence of death imposed upon him.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Florida is reported at 419 So.2d 1067 (Fla. 1982) and is attached as Appendix A.

JURISDICTION

The jurisdiction of this Court is invoked under 28 United States Code, Section 1257(3). The judgment of the Supreme Court of Florida was entered on September 14, 1982. The court denied a timely motion for additional time to move for rehearing or clarification on September 30, 1982. The Honorable Lewis F. Powell, Jr., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit, granted an extension of time to file the present petition for a writ of certiorari from November 13, 1982, to and including December 13, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments of the United States Constitution and Florida Statutes Annotated Section 921.141. Those provisions are set forth in Appendix B to this petition.

STATEMENT OF THE CASE

A. Indictment and Conviction

According to the record available at the sentencing hearing, in January 1976 Petitioner Jeffery Daugherty, at that time 20 years old, left Michigan in the company of his uncle and a 40 year old woman, Bonnie Heath. While travelling through Florida on March 1, 1976, Daugherty and Heath picked up a hitchhiker, Patricia Lavonne Sailer. Heath and Daugherty then robbed Sailer, and Daugherty shot and killed

her. He was arrested in Virginia on March 20, 1976, and was indicted on August 11, 1980, by a Brevard County, Florida Grand Jury, on five separate counts: first degree premeditated murder, first degree felony murder (robbery), first degree felony murder (kidnapping), robbery and kidnapping. On November 18, 1980, Daugherty pleaded guilty to all five counts.

B. The Sentencing Proceedings

Under the aegis of Florida Statutes Annotated Section 921.141, an evidentiary hearing to determine sentence commenced on November 18, 1980 before the Honorable J. William Woodson and a twelve-person advisory jury.

To support its demand for Daugherty's death through a showing of "aggravating circumstances," the prosecution called seven police witnesses, three to testify concerning the circumstances of the Sailer murder and four to testify about the details of other crimes for which Daugherty had been convicted (including testimony concerning convictions in Pennsylvania that were reversed on appeal). The prosecution also called Petitioner's uncle, Raymond Daugherty, who testified about the events surrounding the several crimes and who gave his impression of his nephew's state of mind on those occasions. Of the sentencing record of 290 pages, approximately 100 were devoted to evidence about these other crimes.

After the State rested the defense presented evidence of "mitigating circumstances." Daugherty and a prison

chaplain testified. Evidence was introduced to demonstrate that Daugherty was not a violent or dangerous person and that his crimes were triggered by emotionally disabling circumstances. The thrust of the evidence was that Daugherty had been alternately abandoned and abused as a child; that a childhood head injury inflicted by his father caused him to suffer severe headaches which he attempted to treat with methaquaaludes; that he was only 20 years old at the time of the crimes; and that, as a result of this complex of factors, he came under the perverse influence of Bonnie Heath, a domineering woman more than twice Daugherty's age. The defense also introduced mitigating evidence relating to Daugherty's remorse for the crimes, his sincere conversion to Catholicism, his suicide attempt in prison, and the fact that he would be required to serve 107-1/2 years in prison before becoming eligible for parole.

At the close of the hearing, on November 20, 1980, a majority of the jury returned three advisory general verdicts recommending a death sentence on each of the three counts of murder.* After expressly considering a presentence investigation report, the evidence from the hearing, and arguments of counsel, the sentencing judge found two aggravating factors: (1) that Daugherty had been convicted of another capital felony or a felony involving the use or threat of violence to the person; and (2) that the murder had been committed for pecuniary gain.** Finding "sufficient"

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* Under the Florida system, the sentencing jury's recommendation is governed by a simple majority rule, Fla. Stat. Ann. § 921.141(3).

** Fla. Stat. Ann. § 921.141 (5)(b) and (f) (1981).

aggravating circumstances and "insufficient" mitigating circumstances, R 311,* on April 27, 1981, the trial judge imposed the death sentence for first degree murder. The court also imposed a life sentence for robbery to run consecutively with the death sentence for murder, and a life sentence for kidnapping to run consecutively with the life sentence for robbery. R 302-303.

C. Proceedings in the Florida Supreme Court

On May 28, 1981, an appeal was taken to the Florida Supreme Court pursuant to the automatic review provision of Florida Statutes Annotated section 921.141(4). However, despite Daugherty's request and the directive of section 921.141(4), the record transmitted to the Supreme Court did not include the presentence investigation report, the trial court's sentencing instructions to the jury, the arguments of counsel, the jury voir dire, and a portion of the evidentiary record.

The Florida Supreme Court found "no error" and affirmed Daugherty's conviction and death sentence for first-degree murder on September 14, 1982. On September 23, 1982, Daugherty filed a timely motion for additional time in which to move for rehearing.** Among the issues raised by that motion were the incomplete state of the record on appeal,

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* The record on appeal to the Florida Supreme Court is designated by an "R" followed by the page number.

** Daugherty's appointed counsel below withdrew from this case prior to the issuance of the judgment of the Supreme Court of the State of Florida. Present counsel first appeared with the motion for additional time filed in the Florida Supreme Court and was formally retained on September 30, 1982.

the fact that one or more of the convictions relied upon by the state as an element of aggravation had been reversed, and the possibility of deficiencies in the then unavailable charge to the sentencing jury. Time to move for rehearing expired on September 29, 1982, and the Florida Supreme Court denied the motion for additional time on September 30, 1982.

D. How The Federal Questions Were Raised and Decided Below

Petitioner requested transmittal of the entire transcript of the sentencing proceedings as part of the record on appeal. R 293, 295. He brought the fact that substantial portions of the appellate record were missing to the attention of the Florida Supreme Court in his Motion for Additional Time in Which to Move for Rehearing or Clarification. The invalidity of the Pennsylvania convictions relied on below as an element of aggravating circumstances was also raised in that motion. The court nevertheless denied Petitioner's request for additional time. During the sentencing proceeding, Petitioner raised the issue of the propriety of admitting evidence concerning the crimes that led to the prior convictions, but the sentencing judge concluded that "[the conviction was] . . . important but also all the facts and circumstances surrounding the offense." TT 146.* Petitioner then challenged the introduction of evidence relating to the other crimes in his appeal to the Florida Supreme Court (Petitioner's Brief at 9), and that court rejected his claim. 419 So.2d at 1069.

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* The record of the sentencing proceeding below is designated by a "TT" followed by the page number.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE FLORIDA SUPREME COURT ABROGATED ITS RESPONSIBILITY TO PROVIDE MEANINGFUL APPELLATE REVIEW, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, WHEN IT AFFIRMED DAUGHERTY'S DEATH SENTENCE ON THE BASIS OF A PERFUNCTORY REVIEW OF A SUBSTANTIALLY INCOMPLETE RECORD

To receive the full consideration due under Florida law, Daugherty designated as the record on appeal "the transcription of all Court proceedings occurring in the bifurcated penalty or sentencing phase." R 295. Despite that request and despite the command of the State's death penalty statute that "the entire record" (Fla. Stat. Ann. § 921.141(4)) "shall be subject to automatic review by the Florida Supreme Court" (id.), the court below affirmed Daugherty's death sentence on the basis of a substantially incomplete record, from which were missing: (1) the presentence investigation report; (2) the sentencing instructions to the jury; (3) the sentencing arguments of counsel; (4) the jury voir dire, and (5) a transcript of a forty-minute taped statement by Daugherty that was played at the sentencing hearing. Moreover, the court conducted no independent review of the sentencing record to determine if death was justified by the evidence of aggravation and mitigation. This Court should therefore issue a writ of certiorari in view of the fact that the Florida Supreme Court reviewed the death sentence in a manner "inconsistent with the basis upon which the Florida capital-sentencing procedure was upheld." Gardner v. Florida, 430

U.S. 349, 360 n.11 (1977), citing Proffitt v. Florida, 428 U.S. 242, 254 (1976).

A. Petitioner Was Entitled To A Complete Record on Appeal

This Court vacated the death sentence in Gardner v. Florida, 430 U.S. 349, because the Florida Supreme Court had affirmed the sentence on the basis of an incomplete record on appeal. Since "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion" (430 U.S. at 358), and since "the State must administer its capital-sentencing procedures with an even hand . . . it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia." Id. at 361 (footnote and citation omitted).

If Florida is to to avoid the constitutional infirmities condemned in Furman, the state Supreme Court must engage in "meaningful appellate review," Proffitt v. Florida, 428 U.S. at 251, of the "'total record,'" Gardner v. Florida, 430 U.S. at 349, quoting Swan v. State, 322 So.2d 485, 489 (Fla. 1975), so that it can independently determine whether the death penalty is warranted, and can ensure that similar results are reached in similar cases. Proffitt v. Florida,

428 U.S. at 253, 258. Indeed, this Court expressly relied on the premise that the Florida Supreme Court would engage in "meaningful" and "responsible" appellate review of the complete record "with a maximum of rationality and consistency," and would not engage in "subjective and unpredictable," "ineffective or arbitrary," or "cursory or rubber-stamp review of death penalty cases," when this Court rejected a facial challenge to Florida's death penalty statute. Proffitt v. Florida, 428 U.S. at 258-59.*

Long before Gardner v. Florida, this Court reversed a non-capital criminal conviction where, as here, the state appellate court denied the indigent petitioner adequate review in affirming his conviction on the basis of an incomplete record, even though under state law he was entitled to and requested a complete record on appeal. Entsminger v. Iowa,

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* Every member of this Court has endorsed the principle that complete and meaningful appellate review is a critical procedural safeguard in the Florida system. In Gardner itself, Justice Powell and Justice Stewart joined in Justice Stevens's plurality opinion reversing the death sentence. 430 U.S. at 351-62. Chief Justice Burger (id. at 362), Justice White (id.), Justice Blackmun (id. at 364), and Justice Brennan (id.) each concurred separately. Justice Marshall agreed that review of a death sentence by the Florida Supreme Court based on an incomplete appellate record "alone is enough to deny due process and require that the death sentence be vacated." Id. at 365 (Marshall, J., dissenting). Justice O'Connor has voted to strike down a death sentence because the Florida Supreme Court failed to engage in meaningful appellate review of the complete record. Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 3394 n.46 (1982) (O'Connor, J., dissenting). Justice Rehnquist has asserted that meaningful appellate review is a "crucial protection" that "is by no means perfunctory," and that such review served as a central basis for upholding the Florida death penalty statute on its face in Proffitt. Dobbert v. Florida, 432 U.S. 282, 295 (1977) (Rehnquist, J.). See generally id. at 295-97.

386 U.S. 748 (1967).* The Court held that such a procedure deprived the defendant of "'all hope of any [adequate and effective] appeal,'" 386 U.S. at 752, quoting Lane v. Brown, 372 U.S. 477, 485 (1963) (bracketed material supplied by the Entsminger Court).

Effective appellate review of the complete record is required under Florida law. The Florida death penalty statute mandates that "the judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida . . . after certification by the sentencing court of the entire record." Fla. Stat. Ann. § 921.141(4). The Florida Supreme Court has recognized that it has an independent duty to review the complete record in every death penalty case. Even though the defendant seeks to dismiss his appeal, "[e]ven though defendant admits his guilt and even though he expressed a desire to be executed, this Court must, nevertheless, examine the record to be sure that the imposition of a death sentence complies with all of the standards set by the Constitution, the Legislature and the courts." Goode v. State, 365 So.2d 381, 384 (Fla. 1979) (construing Fla. Stat. Ann. § 921.141(4)). In capital cases, the Florida Supreme Court has recognized that "[o]ur review is of the entire record of the conviction and the sentence of death"; and that a

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* In Entsminger, the indigent petitioner was, upon request, entitled under state law to a complete record on his first direct appeal at state expense, but only to a clerk's transcript in the absence of such a request. Although the petitioner had requested a complete record, his appointed counsel failed to file the entire record. The State Supreme Court affirmed the conviction on the basis of the clerk's transcript alone. 386 U.S. at 752.

capital defendant "has the right to complete review." Delap v. State, 350 So.2d 462, 463 n.1 (Fla. 1977) (construing Fla. Const. Art. V, § 3(b)(1), Fla. Stat. § 921.141(4) and Fla. App. Rule 6.16) (emphasis added).

B. The Record On Appeal Was Missing Critical Portions

Even though Daugherty was entitled to and requested a complete record on appeal,* the Florida Supreme Court affirmed the death sentence on the basis of a record that did not include substantial portions of the sentencing record, the critical nature of which have been recognized in decisions of both this Court and the Florida Supreme Court:**

(1) The Presentence Report. The Constitution demands that where a presentence report is relied upon by the sentencer it must be examined by the reviewing

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* Pursuant to Florida Rules of Appellate Procedure, Rule 9.140(d), Petitioner designated to the Official Court Reporter "[t]he transcription of all Court proceedings occurring in the bifurcated penalty or sentencing phase" (R 295) and requested that they be filed with the Clerk of the Circuit Court as part of the record on appeal. He directed the clerk of the court to prepare "[t]he complete original record on appeal including, but not limited to, all indictments, motions, orders, minutes of the Court, Court Reporter's transcription of Court proceedings and exhibits entered into evidence." R 293. "Here there was no waiver but, rather, an affirmative and timely request that the record be prepared for our use in performing our duty." Delap v. State, 350 So.2d 462, 463 n.1 (Fla. 1977).

** Daugherty need not address in this Court the possibly prejudicial impact of errors in the missing portions of the record, as it is not the function of this Court to evaluate such material in the first instance. Gardner v. Florida, 430 U.S. 354-55 at n.5; accord, Entsminger v. Iowa, 386 U.S. at 752; Roberts v. LaVallee, 389 U.S. 40 (1967) (indigent criminal defendant entitled to complete transcript without any showing of how transcript could be used).

court. Gardner v. Florida, 430 U.S. at 361. In the present case, the record expressly reflects such reliance by the sentencing judge. R 311.

(2) Jury Voir Dire. Errors during the jury selection process may mandate reversal of a death sentence, and therefore the voir dire must be reviewed. Delap v. State, 350 So.2d at 463 (death sentence reversed because transcript of the voir dire was unavailable). Cf. Witherspoon v. Illinois, 391 U.S. 510 (1968); Adams v. Texas, 488 U.S. 38 (1980).

(3) Sentencing Arguments By Counsel. Prosecutorial misconduct during summation may require reversal of a death sentence and therefore must be reviewed. Delap v. State, 350 So.2d at 463 (death sentence reversed because transcript of the sentencing arguments was unavailable). The sentencing court here expressly relied on the sentencing arguments. R 311.

(4) Jury Instructions. Erroneous instructions to the jury may require vacation of a death sentence and therefore must be reviewed. Godfrey v. Georgia, 446 U.S. 420 (1980); Henry v. Wainwright, 661 F.2d 56 (5th Cir.), vacated and remanded on other grounds, ___ U.S. ___, 102 S.Ct. 2922, reinstated following remand, 686 F.2d 311 (5th Cir. 1982).

Additionally, the appellate record did not include a transcript of a forty-minute taped statement by Daugherty which

was played but not transcribed at the sentencing hearing.* See TT 94-95. Having relied on the entire evidentiary record of the sentencing proceedings, the trial court (and presumably the jury**) relied on the taped statement in sentencing Daugherty to die. R 311. The taped statement therefore had to be reviewed. See Entsminger v. Iowa, 386 U.S. at 749 (sentence vacated because record on appeal did not include complete transcript of evidence).

Not only did the Florida Supreme Court shirk its responsibility to conduct a complete review, but it displayed an unconstitutional disregard of Daugherty's right to due process before being deprived of his life when it denied his request for additional time to secure a complete record as a predicate to an informed motion for rehearing or clarification.***

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* Although the tape itself is an exhibit in the record on appeal, it cannot be presumed that the justices listened to it. See Gardner v. Florida, 430 U.S. at 359 n.10. At the very least, the State bears the burden of establishing that the Florida Supreme Court reviewed the tape itself. See Mayer v. City of Chicago, 404 U.S. 189, 195, 198-99 (1971).

** During its deliberations, the jury asked to hear the tape again. R 322-23.

*** Because Daugherty, as an indigent, was entitled to a complete transcript at state expense, Griffin v. Illinois, 351 U.S. 12 (1956), the failure of the clerk and court reporter to submit a complete transcript to the Florida Supreme Court is chargeable to the Florida courts, as "courts have supervisory power over the reporter . . . . Courts have an obligation to exercise sufficient oversight of reporters to ensure that proceedings are transcribed with dispatch." Mayer v. City of Chicago, 404 U.S. at 200 n.1 (Burger, C.J., concurring). Cf. Entsminger v. Iowa, 386 U.S. at 750, 752 (where appellant requested that the trial court "transmit the certified records" (id. at 750) to the State Supreme Court, the "bare election" of his appointed counsel on appeal not to file the complete record, without any notice to the reviewing court or to the appellant, did not constitute a

[Footnote continues]

C. The Florida Supreme Court Failed Properly To Weigh And Evaluate Those Portions Of The Record Which Were Before It

Not only did the Florida court act on a substantially and critically incomplete record, but it is apparent on the face of the per curiam opinion that the court engaged in a narrow, limited review of that fragmentary record which it did have. No "independent review" was conducted; no evidence was "reweighed." The court left wholly to the trial court the task of weighing the evidence, noting that "it is within the province of the trial court to decide whether a particular mitigating circumstance in sentencing has been proven and the weight to be given it." 419 So.2d at 1071. The court below simply found "supported by the record" the trial court's conclusions that "there were sufficient aggravating circumstances and insufficient mitigating circumstances." Id. "Finding no error," the Florida Supreme Court affirmed. Id.

Daugherty is constitutionally entitled to more than the conventional review given by appellate courts in non-capital cases. The Florida Supreme Court's mandate in death penalty appeals is not just to ensure that the trial court has correctly interpreted the law or that there is support in the record for the lower court's sentencing decision.

[Footnote cont'd]

waiver by the appellant of his right to adequate and and effective appellate review of the complete record); accord, Lane v. Brown, 372 U.S. 477 (1963) (the conclusion of appointed counsel that an appeal would not have any merit is no substitute for full appellate review based on a complete trial transcript).

Rather, the Florida Supreme Court is to provide a "third chance for life," Dobbert v. Florida, 432 U.S. 282, 296 (1977), with an enhanced, thorough review "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Proffitt v. Florida, 428 U.S. at 252 (emphasis added; citations omitted). This Court emphasized that the Florida Supreme Court would not, under that system, merely act as a rubber-stamp, but that the "reasons [for the death sentence], and the evidence supporting them, [would be] reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law." Id. at 260.

II.

THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A DEATH SENTENCE CAN BE BASED ON INVALID PRIOR CONVICTIONS

In affirming the death sentence on the basis of the statutory aggravating circumstance that Daugherty "was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," Fla. Stat. Ann. § 921.141(5)(b), the Florida Supreme Court expressly relied on two prior convictions for the killing and robbery of one George Karnes, 419 So.2d at 1068, despite the fact that those convictions had been reversed as unconstitutional by the Pennsylvania Supreme Court in Commonwealth v. Daugherty, 493 Pa. 273, 426 A.2d 104 (1981), due to prejudicial pretrial

publicity. Those invalid prior convictions infected every level of the "tripartite review" of Daugherty's capital sentence, Dobbert v. Florida, 432 U.S. at 295, as the sentencing judge expressly, and the jury presumably, also relied on them. R 312. The prosecution presented extensive evidence before the jury of the facts and circumstances concerning those crimes.*

This Court vacated the sentence in United States v. Tucker, 404 U.S. 443 (1976), on the ground that an unconstitutional prior conviction cannot be considered as a factor in discretionary sentencing. A sentence must be vacated and remanded for a new sentencing proceeding without consideration of any invalid prior convictions where, as here, the sentence is "founded at least in part upon misinformation of constitutional magnitude. . . . The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional . . . ." 404 U.S. at 447.** Cf. Burgett v. Texas, 389 U.S. 109 (1967) (invalid

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* This Court has granted certiorari to determine whether a death sentence should be reversed if the sentencing authority expressly relies on an unconstitutional aggravating factor. Whether or not a death sentence is permissible where the sentencing body alone relies on an invalid aggravating factor, the death sentence here is manifestly unconstitutional because the reviewing court itself expressly relied on the unconstitutional prior convictions. See Zant v. Stephens, No. 81-89, cert. granted, ___ U.S. ___, 50 U.S.L.W. 3244 (Oct. 5, 1981), question certified to Georgia Supreme Court, ___ U.S. ___, 102 S.Ct. 1856 (1982). See also Barclay v. Florida, No. 81-6908, cert. granted, ___ U.S. ___, 51 U.S.L.W. 3362 (Nov. 8, 1982).

** Accord, e.g., Stromberg v. California, 283 U.S. 359 (1931), Yates v. United States, 354 U.S. 298, 311-12

[Footnote continues]

prior conviction cannot be used to enhance punishment under a recidivist statute); Lopez v. Beto, 405 U.S. 473 (1972) (invalid prior conviction cannot be used to impeach defendant's credibility); Townsend v. Burke, 334 U.S. 736, 741 (1948) ("this prisoner was sentenced on the basis of assumptions concerning his record which were materially untrue"). This rule prohibiting the use of invalid prior convictions applies with particular force here because of the greater need for reliability in capital cases. Beck v. Alabama, 447 U.S. 625 (1980).

The Florida Supreme Court disregarded Tucker and departed from its own precedents in the present case. The Florida Supreme Court has held that the word "convicted" in the present statutory aggravating circumstance must be construed to mean "a valid guilty plea or jury verdict of guilty." McCrae v. State, 395 So.2d 1145, 1154 (Fla. 1980) (construing Fla. Stat. Ann. § 921.141(5)(b)) (emphasis added). Accord, Perry v. State, 395 So.2d 170 (Fla. 1980); Provence v. State, 337 So.2d 783, 786 (Fla. 1976); Spaziano v. State, 393 So.2d 1119 (Fla. 1981). See also Wolfe v. State, 323 So.2d 681 (Fla. Dist. Ct. App. 1975) (case must be remanded for sentencing

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[Footnote cont'd]

(1957); Gregory v. Chicago, 394 U.S. 111, 113 (1969); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 570-71 (1970). In Street v. New York, Justice Harlan concluded that "even assuming that the record precludes the inference that appellant's conviction might have been based solely on an [unconstitutional ground] . . . , we are still bound to reverse if the conviction could have been based upon both [an unconstitutional ground] . . . and [a constitutional ground]." 394 U.S. at 587 (emphasis in original).

reconsideration because judge could have been influenced by an invalid prior conviction since it had been specifically called to his attention); Hicks v. State, 336 So.2d 1245 (Fla. Dist. Ct. App. 1976) (re-sentencing is mandatory where sentencing judge considered invalid prior conviction in enhancing sentence); accord, Jenrette v. Wainwright, 410 So.2d 575, 578 (Fla. Dist. Ct. App. 1982) Wilcox v. State, 269 So. 2d 420 (Fla. Dist. Ct. App. 1972).

It is not for this Court to determine whether Daugherty's death sentence "might have been different" if the Florida Supreme Court had not expressly relied on the invalid prior convictions in affirming the death sentence. United States v. Tucker, 404 U.S. at 448. Nor can be it be concluded, except by speculation, that the sentencing judge and jury would have weighed the mitigating and aggravating factors with the same result in the absence of the invalid prior convictions, simply because other factors were also weighed in the balance. Indeed, the prosecution put on extensive evidence of the facts and circumstances of the crimes underlying those convictions, with testimony reconstructing the crimes (TT 128-30, 148-55), the location, number and characteristics of the bullet wounds to the victim (TT 149), the age of the victim (TT 149), and the original trial (TT 150-55). During cross-examination, the prosecutor had Daugherty re-enact the crimes (TT 246-51).

Under these circumstances, an after-the-fact reconstruction of the required weighing process cannot be performed:

> Would the result of the weighing process by both the jury and the judge [-- and the reviewing court --] have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [invalid aggravating factor] . . . shall not be considered.

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977); accord, Miller v. State, 332 So.2d 65 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976).

In the present case there was no "informed . . . inquiry into the question of whether [Petitioner] should be sentenced to death" by the sentencing judge and jury, and by the Florida Supreme Court. Proffitt v. Florida, 428 U.S. at 259. "For we deal here, not with a sentence imposed in the informed discretion of a [sentencing body and reviewing court], but with a sentence founded at least in part upon misinformation of constitutional magnitude" -- Petitioner's unconstitutional prior convinctions. United States v. Tucker, 404 U.S. at 447. The process in which the death penalty was imposed in this case was not "rationally reviewable," and not rationally reviewed by the Florida Supreme Court. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). Daugherty's death sentence must be vacated and remanded for a new sentencing proceeding without consideration of the invalid prior convictions.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER A STATUTORY SCHEME WHICH ESTABLISHES PRIOR CONVICTIONS AS AN AGGRAVATING CIRCUMSTANCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS IF USED, AS HERE, TO PERMEATE THE SENTENCING PROCEEDING WITH DETAILS OF THE UNDERLYING CRIMES

This Court has concluded that Florida's capital punishment statute is structured to assure that "after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death." Proffitt v. Florida, 428 U.S. at 259. A defendant's right to such an inquiry is a basic tenet of the Eighth and Fourteenth Amendments. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.") Daugherty has been denied the focused and objective penalty phase inquiry to which he is entitled.

Essentially all of the State's evidence which related to a statutory aggravating circumstance concerned Daugherty's record of prior criminal acts. The State offered that record under the guise of establishing the second statutory aggravating circumstance: "The defendant was previously convicted of another capital felony or of a felony involving the use or

threat of violence to the person."* Virtually every detail of each of the underlying crimes was the subject of graphic and often cumulative testimony, including the age and sex of each victim (TT 99, 105, 107-08, 115, 132, 134, 149), the race of two of the victims (TT 99, 105), the probable sequence of events preceding the criminal acts (TT 109, 127-29, 133-37), the numbers of stabbings or gunshots involved in the other murders (TT 99, 106-08, 115, 133, 134, 149), the range at which the shootings took place (TT 106-07, 116, 149, 155-56) and even subjective impressions of witnesses as to the amount of blood lost by the victims (TT 105, 107, 134). The lurid details elicited by the prosecution served no purpose other than to inflame the passions of both judge and jury, thus calling into question whether the resulting death sentence was impermissibly based on caprice or emotion.** See Beck v. Alabama, 447 U.S. at 637-38; Gardner v. Florida, 430 U.S. at 357-58 (opinion of Stevens, Stewart and Powell, JJ.). The evidence and argument regarding each of the crimes for which Daugherty had previously been convicted inevitably confused the jury as to the ultimate issue by

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* The court found one other aggravating circumstance, that the capital offense had been committed for pecuniary gain, as it involved a robbery of fifteen dollars and luggage.

** Even where a defendant's prior record is relevant, detailed evidence of the underlying facts and circumstances of prior crimes serves only to incite a jury. See, e.g., United States v. Cox, 536 F.2d 65, 71 (5th Cir. 1976) ("Even if the prosecution did have the right to introduce the fact of appellant's conviction . . . , the execrable details of this activity were completely immaterial, irrelevant, highly prejudicial and inadmissible").

transforming the proceedings into seven mini-trials on the totality of Daugherty's conduct during February and March of 1976.*

The confusion interjected into the presentence hearing by the introduction of such wide-ranging testimony was exactly the type of problem the Florida legislature seemingly precluded by structuring the aggravating circumstance at issue in terms of "convictions" rather than "crimes." "Prior convictions" has been consistently interpreted by Florida's highest court to mean convictions which preceded the sentencing hearing at which those convictions are sought to be used as aggravating evidence. King v. State,

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* In the words of the prosecuting attorney to Daugherty on cross-examination (TT 220):

> What we are concerned with in this courtroom, in this proceeding, and what you're on trial for is your conduct basically on the first day of March as relates to Brevard County, and the other incidents that take (sic) place during the time span I keep referring to, from February to March, so I realize you want to put it out of your mind but we have a right to know about you as an individual then, because the crimes you're answering for are those crimes and not what you've done today.

See also TT 211-12.

Retrying each of a defendant's prior convictions gives rise to a real danger that defendants who have prior criminal records will be, for all intents and purposes, systemically denied effective assistance of counsel at the sentencing phase. It is asking the impossible to expect a court-appointed attorney with a local practice to competently present a defense to aggravating evidence of prior crimes, as against the resources of a state like Florida, which, in this case, produced law enforcement officers from Pennsylvania to testify in great detail regarding crimes committed in that State. Under such circumstances, the guarantee of effective assistance of counsel is illusory.

390 So.2d 315, 320 (Fla. 1980), cert. denied, 450 U.S. 989 (1981); Elledge v. State, 346 So.2d 998 (Fla. 1977). Such an explicit interpretation rules out any notion that evidence of the underlying crimes may also be used by the State in aggravation. The use of such evidence against Daugherty constituted a denial of his right to procedural due process during the sentencing phase, Gardner v. Florida, 430 U.S. at 358, with the concomitant result that imposition of the death penalty was arbitrary and capricious in violation of the Eighth and Fourteenth Amendments. Id. at 364 (White, J. concurring).

CONCLUSION

For the reasons and on the authorities stated above, Petitioner respectfully requests that a writ of certiorari issue to review the decision of the Florida Supreme Court.

Dated: December 13, 1982

Respectfully submitted,

James E. Daniels

Counsel of Record for
Petitioner Jeffery Joseph
Daugherty

Richard H. Sayler
Allan R. Freedman

30 Rockefeller Plaza
New York, New York 10112
(212) 307-4100

Of Counsel:

Robert Garcia
James L. Stengel
Daniel J. Thomasch

DONOVAN LEISURE NEWTON & IRVINE

No. 82-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

-against-

STATE OF FLORIDA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served this petition for a writ of certiorari upon respondent pursuant to Supreme Court Rule 28 by placing a copy in the United States mail with first class postage prepaid, addressed to:

Jim Smith, Esq.
Attorney General
Department of Legal Affairs
Suite 1502 - The Capitol
Tallahassee, Florida 32301

C. Michael Barnette, Esq.
Assistant Attorney General
125 North Ridgewood Avenue, 4th Floor
Daytona Beach, Florida 32104

Sid J. White, Clerk
Florida Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Done this 13th day of December, 1982.

James E Daniels

James E. Daniels, Esq.